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No. 93-1726

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

TARRANT SERVICE AGENCY, INC., - Petitioner,

versus

AMERICAN STANDARD, INC.,
d/b/a THE TRANE COMPANY, - - Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED BY PETITIONER

In a case alleging monopolization under Section 2 of the Sherman Act, must the relevant market for parts to repair and service durable goods necessarily include generic parts which are not peculiar to the durable goods themselves?

QUESTION AS STATED BY RESPONDENT

Whether the Sixth Circuit was correct in holding that a product may not be excluded from the relevant antitrust market solely because it has uses outside that market.

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COMPARISON OF STATEMENTS OF QUESTION PRESENTED

Respondent, American Standard, Inc., d/b/a The Trane Company ("Trane") has rephrased the question presented by Petitioner, Tarrant Service Agency, Inc. ("Tarrant"), in

such a way as to divert the focus of the petition. Tarrant asks "must the relevant market for parts to repair and service durable goods *necessarily include* generic parts which are not peculiar to the durable goods themselves?" Respondent changes the question to ask whether a product *may not be excluded* from the relevant antitrust market solely because it has uses outside that market. (Emphasis added). The difference in phraseology is not trivial. The manner in which this Court perceives the question may significantly influence its analysis of the underlying reasons supporting a grant of the petition. The Sixth Circuit Court of Appeals clearly stated that ". . . generic parts . . . are part of the relevant market." Pet. App. at 8a. This is a categorical appellate determination as to the proper elements of the relevant market in the aftermarket for service and repair of durable goods, which has markedly different ramifications from approaching this petition from the perspective of whether a product may not be excluded, as will be more fully demonstrated below.

STATEMENT OF THE CASE

Trane's Statement of the Case has set forth most of the facts with substantial correctness. However, there are several assertions which distort the real issue presented by this Petition. Trane states that in the repair parts business it competes with hundreds of other suppliers. Resp. at 2. Recognizing that the issue of this appeal involves the distinction between Trane genuine parts and duplicator parts, on the one hand, and generic parts on the other, the above statement regarding the extent of competition faced by Trane ignores that distinction. The number of competitors in the market excluding generic parts is dramatically smaller than in that including such parts.

Trane has repeatedly characterized Tarrant as a mail order parts operation. No definition having been given for this term of art, its use was intended to convey all nega-

tive connotations normally associated with those words. The truth, however, is that Tarrant is a legitimate highly capitalized, deeply invested, service oriented organization whose business consists exclusively of selling parts for and providing advice on the service and repair of Trane HVAC equipment.

Trane's characterization of Tarrant's history in the sale of parts for Trane equipment ignores important facts concerning Tarrant's prior relationship with Trane. Tarrant operated as a Trane Commercial Sales Office ("CSO") in Louisville, Kentucky from 1970 until 1976, when Tarrant became an authorized parts outlet ("APO") for Trane. This relationship continued until 1986. when Trane decided to eliminate the APO System, leaving Tarrant with no alternative in the continuation of its Trane parts business but to begin acquiring Trane parts through Trane's CSO's. This it did in the open market. Although Tarrant found it necessary to supplement these sources through the acquisition of some duplicator parts, its procurement of Trane genuine parts from the CSO's continued with Trane's knowledge and acquiescence until 1990 when Trane instituted its Broker Policy. (Lane Tarrant, TR Vol. 1, 53-65).

The alleged justifications for the Broker Policy were presented at trial and were clearly rejected by the jury. Trane asserts that Tarrant fell within Trane's definition of a broker, but neglect to state that at the time of trial Tarrant was the only dealer who was so classified under the Broker Policy. (William Johnson, TR Vol. 3A, 14).

RESPONSE TO ARGUMENTS IN OPPOSITION TO PETITION

Trane's characterization of the ruling by the Circuit Court of Appeals is inaccurate. Unquestionably, the Court of Appeals determined, as a matter of law, that generic parts should be included in the relevant market for the

service and repair of Trane HVAC equipment. Once that determination had been made, albeit incorrectly in Tarrant's view, the Court of Appeals had little difficulty in finding that Tarrant had failed to produce evidence of monopoly power in that expanded market definition.

It is important that the distinction between determining the proper elements of the relevant market and proving those elements be kept in mind in analyzing this Petition. To state that the Court of Appeals had not ruled that the relevant market must include generic parts as a matter of law is to ignore the very language of the decision. ". . . generic parts . . . are part of the relevant market." Pet. App. at 8a.

Trane suggests that the Sixth Circuit decision in this case is consistent with *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, ___ U.S. ___, 112 S.Ct. 2072 (1992), on the assumption that the settings of these two cases are effectively identical. But they are not. The factual situations are critically different: In *Kodak*, the aftermarket parts were available solely from the manufacturer of the equipment. Whether generic parts of any significance entered into the repair and servicing of *Kodak* copiers was not an issue discussed in that opinion. In the present case, the availability of duplicator parts creates a larger market, but one which is nevertheless susceptible to monopolization by the original equipment manufacturer.

Although, on its facts, *Kodak* proscribed monopolization in single source aftermarkets, it should not be so narrowly applied. In the current state of technological development, the United States economy contains very significant aftermarkets for the service and repair of durable goods of all kinds, and the impact of monopolization and attempted monopolization of those aftermarkets by the manufacturers of original equipment clearly deserves further examination. To preclude such inquiry in those cases

where *some* competition exists does a disservice to the therapeutic influence which *Kodak* may have on aftermarkets in general.

In the instant situation Trane sells parts for the service and repair of its equipment. Some of those parts are available only from Trane and a smaller number are available from Trane and duplicator sources. To be sure, Trane may market generic parts under its label although such parts are available from a wide variety of other sources. However, to necessarily include generic parts in the definition of relevant market for the service and repair of Trane equipment is to ignore the commercial realities in this and other aftermarkets for service and repair of durable goods. Purchasers of the non-generic parts have limited sources from which to acquire those items, and dominance of that market by the original equipment manufacturer can have serious anti-competitive influences on the prices of such parts.

Trane attacks Tarrant for having provided no factual support for excluding generic parts from the relevant market. Such a challenge is tantamount to demanding clairvoyance on Tarrant's part in prosecuting its appeal in order to have anticipated the rationale which would be the foundation of the Sixth Circuit opinion.

Tarrant did submit proof as to the relevant market comprised of Trane genuine parts and duplicator parts. Furthermore, the jury was clearly instructed at trial that the relevant market could consist of any combination of Trane genuine, duplicator and generic parts. In the absence of proof of monopolization as to generic parts, it is clear that the jury's verdict was based on a relevant market consisting, at most, of Trane genuine and duplicator parts.

Trane's efforts to call upon the decision in *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956) to

support its argument fails to recognize a critical factual distinction between *duPont* and this case. The *duPont* decision did not address an aftermarket, but rather a conventional market for products sold and purchased without regard to any other specific products with which they might be used.

Although the decisions in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), *United States* v. *Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir.) *cert. denied* 498 U.S. 920 (1990), and *California* v. *American Stores Company*, 697 F.Sup. 1125 (C.D. Cal. 1988), aff'd, 872 F.2d 837 (9th Cir. 1989), *rev'd on other grounds*, 495 U.S. 271 (1990), may have been addressed to questions of merger and acquisition, their reasoning with respect to "clustering" is equally applicable to the anti-trust analysis of aftermarkets. To be sure, none of these cases were presented to the Sixth Circuit as the trial court decision on appeal was not founded on the inclusion or exclusion of any specific element of the relevant market.

Trane argues that Tarrant bore the burden of proving the relevant market and that it further bore the burden of proving that generic parts should be excluded from that market. What Trane did prove, and all that was necessary under its relevant market definition, was the existence of a market consisting either of Trane genuine parts alone or Trane genuine parts plus duplicator parts. As stated above, based upon this proof and the instructions of the trial judge, the jury did find a relevant market which necessarily excluded generic parts as no proof was presented regarding Trane's monopolization of a market including generic parts.

The testimony of Joseph Grom does not negate the finding of the jury. Mr. Grom is a layman, not an expert witness, and his responses to interrogation were given from the perspective of a person familiar with the HVAC equip-

ment parts business, and not with the subtleties of anti-trust relevant market definition.

Contrary to Trane's assertion, evidence was presented regarding the price sensitivity in the relevant market of Trane genuine parts and duplicator parts. (John Samsa, TR Vol. 2, 153-155; Wesley Burns, TR Vol. 2, 169; Darrell Scarborough, TR Vol. 2, 180-183; Donald Blumberg, TR Vol. 2, 42). From that evidence the jury was free to find that Trane's monopolization of that relevant market justified its verdict in favor of Tarrant.

In summary, Tarrant urges the Court to accept this Petition in order to explore more fully the impact of monopolistic practices in aftermarkets for the repair and service of durable goods, a subject which was opened, but not closed, by the *Kodak* decision. The interest of the consuming public will be better served if competition in all such aftermarkets is promoted rather than deterred through the application of the Federal anti-trust laws.

CONCLUSION

For these reasons and those set forth more full in the Petition, a writ of certiorari should be granted.

Respectfully submitted,

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